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INFORMATION

For Sir *William Ker* of *Green-head*, and the other
Creditors of *Harwood*,

Against

The Children of the Deceast *Alexander Paterfon*.

SIR *William Ker* of *Greenhead* and others, being Cautioners for *Harwood* in the Sum of 10000 lib. *Harwood* the Principal granted them an Heretable Bond of Relief, whereupon they were Inset in May, 1681.

Harwood becoming Debitor to *Alexander Paterfon*, he granted him an Heretable Bond in August, the same year 1681. after the Insetment of Relief.

Harwoods Estate being sold by Roup, there is a debate for preference betwixt the base Insetment for relief, and the posterior Insetment of Annualrent in favour of *Paterfon*, whose Children crave to be preferred, because the Insetment of Annualrent though base, and posterior in date, yet it was first clad with Possession: In so far as there is produced an Antapocha by *Harwood* the Debitor, acknowledging the receipt of a Discharge of a Terms Annualrent; likewise there is produced a Decreet of Poynding of the Ground.

It was Answered, both Instructions of the Annualrenters Possession are most suspect, and no ways probative. For 1. The Antapocha is only the Deed of the Debitor after he was broken, and not to be regarded. 2. The Decreet which followed, is for Poynding of the Ground for the same Terms Annualrent that the Antapocha mentions, to be discharged. 3. The Decreet is vitiated in the Decernitor particularly in these words, *For the Term of Martinmas last bypast*.

But suppose the Instructions of Possession were good, *Greenhead* and the other Creditors do chiefly insist upon this Ground, that an Insetment of Relief is a compleat and valid Right from the date, and needs no Possession to compleat because an Insetment of Relief can never be presumed to be fraudulent, but carries the Instruction of an Onerous Cause along with it; For without a distress executed, it can never be effectual: And the presumption of Fraud and Lachry of other base Insetments, not clad with Possession, is the reason why posterior Publick Insetments are preferred to them; and that reason ceasing, Insetments of Relief are compleat Rights from their date; and for the same reason

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son, Infeftments of Warrantice are reckoned effectual and valid without Possession.

It was Answered, That Law and Custom hath cleared, that base Infeftments are not regarded as compleat Rights, till they be Confirmed by Possession: And there is no distinction in Law or Practique betwixt base Infeftments of Relief and others. And it hath been particularly decided in the case of *Inglis contra Tennents of East-Barns*, June 26. 1677. That Infeftments of Relief were not compleat or valid from their date, but only according to their Possession. 2. There is a great difference betwixt an Infeftment of Warrantice, and an Infeftment of Relief; For an Infeftment of Warrantice is validat and confirmed by the Possession of the Principal Lands.

It was replied, That base Infeftments are not reckoned valid without Possession, which was introduced, more by Custom and uniform practice, than by any positive Law, and that custom being found inconvenient, is corrected by a late Act, whereby all Infeftments duely Registrat, are equally valid from the date, & it is certain, that where a Law is introduced by uniform Custome and Practise, it goes no further than the Practise doth reach; and it cannot be pretended that Practise hath cleared the case of Infeftments of Relief to require Possession; For all the Precedent condescended upon, is a single Practique, and to cleid that, there are two more solemn Practiques in the contrair, viz. Monsieur *Somerdyk* against the Creditors of *Kincardine*, and another in the Competition of the Creditors of *Clackmannan*, so that nothing can be founded upon Practise.

2. Neither can any thing be alledged upon the Analogy, betwixt Base Infeftments of Relief, and other base Infeftments, because there is a vast disproportion betwixt the two; other base Infeftments are in Practise presumed fraudulent, so long as they are not made publick by Possession, or otherways, whereas Infeftments of Relief cannot admit of Possession until Distress.

3. There is a perfect Analogie and Proportion betwixt Infeftments of Relief and Infeftments of Warrantice, both are granted for Security in a certain Event, and neither are proper Titles of present Possession, and uniform Decisions, have cleared that Infeftments of Warrantice, are valid without Possession, and there is no reason to difference the one from the other.

4. As to the Practique, *Inglis contra the Tennents of East-barns*. It vary's materially from this Case; For that was the Case of a Competition of two base Infeftments of Relief, and both of them did provide present access to the Meals and Duties that the Receiver of the said several Infeftments might have in their own hands to relieve themselves, whereby these Infeftments were present Titles of Possession, whereas this Infeftment of Relief, is merely an Infeftment for Security, and equivalent to an Infeftment of Warrantice, and did not afford a present Title of Possession; and therefore there was good reason to consider the Infeftment of Relief mentioned in that Practique, as in the same Case with other base Infeftments, because, the speciality that differences

ences Infeftments of Relief from others, is, That not being present Titles of Possession, there arises no Presumption of Fraud from the want of Possession.

The precise ground upon which *Greenhead* founds, being that the nullity of base Infeftments is chiefly introduced by Custom which by no precedent hath been extended to such Infeftments as that now in the Field; That Position is yet further clear, by 105. *Act Parliament 1540*. Which gave the first rise to anullbase Infeftment, which *Act* proceeds from a Narrative of Fraud, by Disposing Lands formerly Disposed to Banns, or Friends, or others: And therefore it is Ordained, that who sells Lands, or Annualrents, and puts others in privat State thereof, not by Resignation, or Confirmation, that the Person who gets the Land, and bruiks the same peaceably year and day, and so is known Heretable Possessor thereof, year and day, the Person having privat State and Seisin, shall never be heard to claime the same against the second Heretable Possessor.

This *Act* Relates chiefly to the Disposition of Lands, and respects no Possession, but a continued Possession year and day, and being made before the *Act* of Parliament 1617 Requiring the Registration of Seisins, it became a very useless *Act*, and there was no reason to Extend it beyond the precise Terms of it; because the Reason of the Law was, that Purchasers could not know private Infeftments, which Reason ceased by the Registration of Seisins, and no Seisin in publick Register, could be properly called *latent*, notwithstanding in Practice not only Heretable Possessors, year and day. But Annualrenters, who had either received payment of Annualrent privately from the Debitor, or had used a Citation against him, were reckoned to have made their base Infeftments publick by Possession, to the exclusion of anterior Infeftments, which Custom was introduced without any Foundation, either in Law or Reason such Possessions not being regarded by the foresaid *Act* of Parliament, but only continued Possession, neither did the *Act* of Parliament regard Possession of Annualrenters, but what Custom Introduces, is not to be contraverted, only such a Custom not being founded upon Reason, and abrogated by an expresse *Statute*, it ought not to be extended to any Circumstance beyond the custom, and it cannot be pretended, there is any uniform custom, requiring Possession to validate Infeftments of Relief: But the Custom is rather on the contrary, and more expressly in the parallel case, of an Infeftment of Warrandice.

And whereas, it is alleadged, that the Reason why Infeftments of Warrandice require no Possession, is, because Possession of the principal Lands is reckoned Possession of the Warrandice.

It is Answered, The matter of Fact is clear, and acknowledged, That Warrandice requires no Possession; and it is altogether denied, that the Possession of the principal Lands is the reason, for that is a meer fictitious Possession, without any Foundation in Reason, unless it be, that the Warrandice cannot be possess till eviction, and in that the case, is parallel with an Infeftment

